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No. 811

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

F. W. WOOLWORTH CO.,
*Petitioner,*

vs.

HENRI A. MEIS, Trustee Under Agreement Dated December 26, 1945, and Known as the Blanche Meis Trust,
*Respondent.*

## PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES LAW PRINTING CO., CHICAGO 16, ILL. LA review 5-6581

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### I.

### The Facts In The Case at Bar Cannot Be Distinguished From the Kaufman Case.

(Reply to Respondent's Brief, Point I)

If the case at bar were relitigated in a local Illinois court, petitioner would unquestionably prevail. By *Kaufman*, (App. 21), the Appellate Court of Illinois imposed only two qualifications upon the landlord's liability for an unforeseen structural addition. First, there must be no

lease provision requiring the tenant to make the addition. Second, the event must have been unforeseen at the time the lease was executed. Both of these conditions are squarely met in the case at bar. The majority opinion below pays lip service to Illinois law but circumvents it because of what is described as "substantial evidence of intention" to the contrary. (App. 5) This "substantial evidence" is the landlord's refusal, where a public utility was supplying heat, to approve the tenant's form lease provision obligating the landlord to be responsible for heat. The parties admittedly never discussed the possibility of the utility's failure.

The landlord's refusal to be responsible for heat under these circumstances is inconsequential since the Illinois rule was formulated under substantially identical circumstances, *i.e.*, the Kaufman landlord had not undertaken any obligation in the lease to supply either heat or a source of heat.

Respondent's brief is replete with policy arguments why the tenant rather than the landlord should bear the unforeseen economic burden of the heating unit. However, these are the same arguments that were rejected in the *Kaufman* case. Respondent states:

> 1. "Petitioner Woolworth chose its own source of heat, the economic burden of which it undertook to assume during the entire term of the leasehold." (Respondent's Brief, p. 3)

By contracting directing with the utility, the Kaufman tenant undertook precisely the same burden.

2. "Knowingly, the tenant undertook all future contingencies with respect to heating the building." (Respondent's Brief, p. 4)

In fact, it is admitted that, as in the *Kaufman* case, the possibility of the utility's failure was never discussed.

3. "There should be no distinction between 'heat' and a 'source of heat' where the total cost of paying for heating the building was the obligation of the tenant." (Respondent's Brief, p. 4)

Again, the Kaufman tenant's obligation was identical.

Respondent's arguments, which were so persuasive in the courts below, should, under the *Erie* doctrine, have been addressed to the Appellate or Supreme Court of Illinois. In this diversity action, the federal court is without authority to reconsider the wisdom of state substantive law.

## II.

## The Supreme Court of the United States will Not Accept the Interpretation of Local Law by the Circuit Court of Appeals Where the Local Courts Have Previously Established a Contrary Interpretation.

(Reply to Respondent's Brief, Point II)

This Court will not accept the Court of Appeals' interpretation of local law where local law has been clearly established by the Appellate or Supreme Court of the state. In the case at bar, the Court of Appeals was no longer free to determine whether the burden of providing a source of heat should be placed upon the landlord or the tenant. The *Kaufman* case had already decided that question in petitioner's favor.

If the instant suit had been brought in a local Illinois court, it is possible that the Appellate Court of Illinois or the Illinois Supreme Court might have reconsidered or rejected the *Kaufman* rule. Whether the landlord or tenant should bear the burden of unforeseen additions may be a debatable question. In a diversity action, however, the federal court has no discretion to reconsider local substantive law and petitioner's selection of the federal forum was deliberate in order to invoke that protection.

The majority opinion below has done by indirection what the *Erie* doctrine forbids it to do overtly, *i.e.*, overruled Illinois law by "interpreting" it contrary to its unequivocal statement in an Illinois decision.

## III.

**There is No Factual Dispute in The Case at Bar. The Conclusions of the Court Below are Subject to Review.**
**(Reply to Respondent's Brief, Point III)**

Petitioner and respondent agree upon the facts in the instant case. The legal conclusions to be drawn from these facts are disputed. Consequently, the rule that concurrent findings will not be disturbed unless plainly without support is inapplicable. If the majority opinion below is in conflict with Illinois law, review on writ of certiorari is appropriate, Rule 19-1(b) Revised Rules of the Supreme Court of the United States.

## CONCLUSION.

Respondent's arguments demonstrate that the decision below was arrived at by considering questions of local policy, rather than existing local law. This Court should exercise its discretion in favor of issuing its writ of certiorari to the United States Court of Appeals for the Seventh Circuit and thereafter reviewing and reversing the decision of that court.

Respectfully submitted,

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March 7, 1963.